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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,941	01/03/2002	Carolyn Jean Cupp	112701-330	7917
29157	7590	05/05/2006	EXAMINER	
BELL, BOYD & LLOYD LLC			HENDRICKS, KEITH D	
P. O. BOX 1135			ART UNIT	PAPER NUMBER
CHICAGO, IL 60690-1135			1761	

DATE MAILED: 05/05/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/037,941

Applicant(s)

CUPP ET AL.

Examiner

Keith Hendricks

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE ____ MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☐ Claim(s) ____ is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☐ Claim(s) ____ is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. ____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____. |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____. | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on February 01, 2006, has been entered.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 7-12, 18, 20, 25, 27, 28, and 30-33 remain rejected under 35 U.S.C. 102(b) as being anticipated by Collings et al. (EP 0 645 095). The reference and rejection are incorporated as cited in a previous Office action.

Applicant's arguments filed February 01, 2006, have been fully considered but they are not persuasive. Applicant's 1.132 declaration has been considered but is not deemed persuasive, as the rejection is maintained for the reasons of record.

At pg. 2 of the Feb 2006 response, applicant states that the density of Collings differs from that of the instant claims, namely that the product of Collings allegedly has a density of 12.123 lbs/ft³, whereas the instantly claimed product has a density of about 16.8 to about 20 lbs/ft³. However, it is noted that in providing the calculations, applicant used measurements from the *package containing the product* of Collings, and not from the product itself. Thus this contains air space which would be expected to lessen the density of such an article. Applicant has provided no convincing evidence or argument on the record which provides an accurate comparison of the prior art product with that of the instant claims. As such, the rejection is maintained for the reasons of record.

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Applicant also submits arguments regarding the measurement properties of the Collings product which were previously submitted and addressed on the record. These are not new arguments and are not deemed persuasive, as previously addressed. Again, regarding the issue of “a thickness of at least 12 mm and a length that is greater than the thickness”, it is noted that no third dimension is provided in the claims, either in a relative proportion or as a specific amount. This is important to note because given only two dimensions, “length” and “thickness” (or depth), these may be interpreted in multiple ways, depending on the viewed perspective of the dried pet food. In one view, one may perceive a thickness/depth, but turned on its side, what was previously the “thickness” may now be its width. The longest dimension would always be the length, while the other two dimensions would be open to interpretation with regard to perspective of width or depth/thickness. As previously stated on the record, Collings et al. state that “the extruded strand swells upon exiting the die due to flashing of moisture to steam producing an expanded structure. The strand is cut into 46 to 55 mm lengths of pieces or chips” (pg. 5, ln. 8-10) and is then further dried. The top of page 6 of the reference states that the extrudate was produced “in the form of an expanded strand 50.1 mm in length, 25 mm in width and 9 mm in depth. The strand product swelled upon issuing from the die... [and] was cut into 10 mm thick wavy-shaped chips.” Given the scenario described above, however, without the recitation of a measurement for all three dimensions, the referenced teaching of “50.1 mm in length, 25 mm in width” may reasonably be interpreted as having “a thickness of at least 12 mm and a length that is greater than the thickness”, wherein the width is viewed as the thickness.

Applicant again states that “Collings is unconcerned with the density and size of the pet food product to provide a resultant product that can remove more plaque and tartar build-up than similar pet food products” (pg. 2, response). This is not deemed persuasive for the reasons of record. Applicant appears to be stating that, although the product of Collings et al. provides improved resistance to breakage on shipping and handling, this would somehow not translate to improved resistance to breaking upon chewing by a pet. This is not a logical conclusion, and has no basis within the reference or the state of the art at the time the invention was made. Applicant has suggested “improved dental cleaning properties” in their arguments, yet this is not found in the instant claims. In fact, however, applicant’s own specification, at the top of page 9, states that “being of a low density, the foam [i.e. claimed product] absorbs tooth pressure without splintering and/or crumbing during the chewing process.” Thus, regardless of the source of the external pressure applied to the product, be it a shipping package material

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or a pet's teeth, the same properties (a) are present and inherent, and (b) would be the result of the same components and overall structure within both the claimed and referenced products.

Thus and again, although the reference does not specifically disclose every possible quantification or characteristic of its product, including density data, the density of the product would have been within the instantly-claimed range of "about 16.8 lbs/ft³ to about 20 lbs/ft³", absent any clear and convincing evidence and/or arguments to the contrary. The reference discloses the same starting materials and methods as instantly (both broadly and more specifically) claimed, and thus one of ordinary skill in the art would recognize that the product density, among many other characteristics of the referenced product, would have been an inherent result of the product disclosed therein. Similarly, regarding instant claims 28 and 31-33, the resultant texture of the extruded product would also have been an inherent result of the disclosed product, based upon the same starting materials and methods of production. Furthermore, at page 5 the reference states that the "plasticized food" component "swells upon exiting the die due to flashing of moisture to steam producing an expanded structure" (lines 8-9). This process is similar to that found in the production of cheese puffs, which also expand upon exiting the heated extruder through a constrictive exit passageway, and also contain pockets of air and circular pores as a result of this process. The Patent Office does not possess the facilities to make and test the referenced product, and as a reasonable reading of the teachings of the reference has been applied and does anticipate the instant claims, the burden thus shifts to applicant to demonstrate otherwise.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-6, 13-17, 19, 21-24, 26 and 29 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Collings et al., in view of Hand et al. (US PAT 5,431,927). The references and rejection are incorporated as cited in a previous Office action.

Applicant's arguments filed February 01, 2006, have been fully considered but they are not persuasive.

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At page 3 of the response, applicant states that one would not have been motivated to combine the teachings of Collings et al. and Hand et al., because Collings et al. is directed to an unstriated product, while Hand et al. is directed to a striated product. Applicant alleges that this somehow presents a teaching away from the primary reference, and alleges that the July 30, 2004 Office action admits such. This is not persuasive for the reasons of record. Applicant's allegation that the PTO admitted that there was a "teaching away" is inaccurate and erroneous. At no point did the Office "admit that Hand and Collings relate to different types of pet foods," as stated in applicant's previous response, nor did the examiner admit to a "teaching away." Page 4 of the July 30, 2004 Office action specifically stated that "Hand et al. provides a similar pet food product" to that of Collings et al. Applicant has provided no basis for their statements. The Office actions have continued to clearly indicate (a) a positive teaching toward the motivation to combine, and (b) that there is no such "teaching away." Applicant's continued pursuit of this misdirected notion does not serve to clarify the record or further prosecution.

Applicant states that Hand teaches away from Collings, due to the striated appearance of the product of Hand. Applicant is referred to the Final Office action of September 02, 2005, where this has already been addressed. It is noted that the primary reference, Collings et al., teaches an unstriated product, just as instantly claimed. The 1.132 declaration addresses the products of the references with regard to un/striated appearance and method of producing, yet this was already known and appreciated on the record. It does not serve to present any new and/or unexpected properties of the claimed invention, nor does it serve to overcome the proper rejections of record.

The Hand reference was provided to demonstrate that other similar pet food products were well known in the art, and were produced having the same dimensions as instantly claimed. Given this, it would have been obvious to one of ordinary skill in the art to have provided the pet food product of Collings et al. having the instantly claimed dimensions, absent any clear and convincing evidence and/or arguments to the contrary. Applicant has not demonstrated a patentable distinction or criticality to the extra 2mm in thickness (any difference between 10mm and 12mm). It is noted that this would not be expected to relate to the "improved dental cleaning properties" as applicant alleges, nor would it materially affect the density of the product.

Finally, reference is made to MPEP 2144.04 IV (a), which states:

Changes in Size/Proportion

In re Rose, 220 F.2d 459, 105 USPQ 237 (CCPA 1955) (Claims directed to a lumber package "of appreciable size and weight requiring handling by a lift truck" were held unpatentable over prior art lumber packages which could be lifted by hand because limitations relating to the size of the package were not sufficient to patentably distinguish over the prior art.)

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In Gardner v. TEC Systems, Inc., 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), *cert. denied*, 469 U.S. 830, 225 USPQ 232 (1984), the Federal Circuit held that, where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device.

Conclusion


This is an RCE of applicant's earlier application of the same serial number. All claims are drawn to the same invention claimed in the earlier application and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the earlier application. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action in this case. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no, however, event will the statutory period for reply expire later than **SIX MONTHS** from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


KEITH HENDRICKS
PRIMARY EXAMINER